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IN THE

Supreme Court of the United States

October Term, 1944.

No. 440

MAX GOLDBERG,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In petitioning for a rehearing from the denial of certiorari in this cause, petitioner realizes that such a rehearing is unusual. However, this is an *unusual* case. Ordinarily a petitioner has his day in the trial court and a review in the Court of Appeals. In the instant case, petitioner did *not* have his day in the trial court because the District Judge granted a *summary* judgment upon his *assumption* (R. 118) that the decisions of the Seventh Circuit in *RFC* v. *Pelts*, 123 F. (2) 502 and *RFC* v. *Barrett*, 131

F. (2) 645, holding that the "beneficial owners" are liable together with the "registered owner," warranted a judgment for the plaintiff although it was *denied* by the Answer (R. 88) that petitioner was *ever* a beneficial owner. The Court of Appeals did *not* affirm the Judgment on the decisions on which respondent relied (R. 115) and on which the Court *based* its Judgment (R. 118) but upon a theory which it advanced for the *first* time in its Opinion (R. 167), which was not *even raised* by the respondent. This theory that there is a "marked distinction" in Illinois between "ownership" of bank stock by an Investment Trust and the ownership thereof by a Corporation so that shareholders of a Trust *are* "owners" of the bank stock which the Trust held, while shareholders of a Corporation are *not* *"owners"*, is *not* supported by *any* authorities. It *runs counter* to the decisions of this Court as well as to decisions of other Circuits, and of the local law which is controlling.

Petitioner feels that a great injustice was done when he was adjudicated to pay, under the modified Opinion, $18,-787.88 plus interest at 5% from July 8, 1941, as a beneficial owner of bank stock of which he was *neither the actual nor beneficial owner.*

The denial of certiorari in this case was perhaps due to the *misleading* statement of respondent in its Answer to the Petition (p. 2) that the question presented was whether petitioner "was one of the real or beneficial pro rata owners of 930 shares of bank stock purchased with funds subscribed by 36 persons, under the terms of a Trust or Syndicate Agreement and registered in the name of a nominee." The record *does not present such a question.* None of the 36 persons *ever subscribed* or purchased any of the bank stock and there was no such allegation in the Complaint. The Complaint alleged (R. 35(6)) that "on various dates . . . various persons subscribed to said

Agreement" and "paid" to the Syndicate or Trust the sum of $495,000.00 and the "Managing Committee" or the Trustees purchased the bank stock for the Syndicate. It also alleged (R. 35(e)) that the petitioner and the other persons "subscribed for the respective fractional parts of said Syndicate" and "paid" the "Syndicate" for their subscriptions. The 36 persons *invested approximately one half million dollars* in a valid Investment Trust which Trust purchased the bank stock, among other securities. The bank stock was *never distributed to the shareholders* of the Trust nor were dividends ever distributed to them, but were paid directly to the Trust. They were not entitled to, nor could they demand distribution.

The *real* question which this record presented was: Whether shareholders of an Investment Trust which purchased bank stock in the name of its nominee and kept it in its portfolio among other securities are owners of the bank stock prior to any distribution or segregation of the securities among the shareholders? The Court of Appeals held that the shareholders of the Trust are the "owners" of the bank stock and *not* the Trust. Its decision *cannot be reconciled* with the decision of this Court in *Anderson* v. *Abbott*, 321 U. S. 349, where it *distinguished* the "Banco" from an "Investment Trust", saying (p. 358):

> "It was in *no true sense* comparable to *an investment trust* or holding company, *which holds bank stock in a diversified portfolio.*" (Italics ours.)

The decision also runs counter to the decision of the Sixth Circuit in *Laurent* v. *Anderson*, 70 F. (2d) 819, where the Court said, at page 822:

> "We may assume that *in the case of a strict trust*, in absence of a Statute of an express agreement to the contrary, the Trustee—and *not the beneficiary* is liable for individual liability against stockholders." (Italics ours.)

The decision is also not in accord with the Opinion of the Fourth Circuit in *Nettles* v. *Childs*, 100 F. (2d) 952, as shown in the Petition (pp. 29, 32).

The decision holding that petitioner was liable as a "shareholder" for the *contract* of the "Trustees" is in *conflict* with the holding in *Taylor* v. *Davis*, 110 U. S. 330 that a Trustee *cannot bind the beneficiary* to make him liable on contracts made by the Trustee because a Trustee is *not* the agent of the Cestui que Trust. This Rule was adopted in Illinois in *Schuman-Heinck* v. *Folson*, 328 Ill. 325, 329, which held that "when a Trustee contracts, he does so for himself. He has no principal." This is the *universal* Rule (3 Bogert on Trusts, Section 712).

The Seventh Circuit affirmed the Judgment below because (R. 167) the "legal title" was in the Trustees and the "equitable title" was in the "shareholders" and they were, therefore, the beneficial owners of the bank stock. Its decision was *contrary* to the decision in *Babcock* v. *Chicago Ry. Co.*, 325 Ill. 16, 30, where the *distinction* between shareholders in a Trust and shareholders in a corporation was not recognized, the Court saying (p. 30):

> "A Trustee * * * is vested with the legal and equitable title subject only to the provisions of the Trust."

The Opinion is also *irreconcilable* with the latest decision of this Court in *Anderson* v. *Abbott*, 321 U. S. 355, where this Court said, at page 361:

> "Limited liability is the rule, not the exception."

There was no exception here to the rule because the Trust was *not* organized for the purpose of transferring bank stock from individuals to the Trust for the purpose of escaping personal liability. None of the "shareholders" were owners of the bank stock at the time and the bank stock was purchased by the Trust among other securities in which the subscribers to the shares in the Trust invested approximately a half a million dollars.

The decision of the Illinois Supreme Court in *Martin* v. *Central Trust Co.*, 327 Ill. 622, holding that the shareholders of a corporation are *not* owners of the stock which the corporation owns in other companies (followed in *Harris* v. *Chicago Title & Trust Co.*, 251 Ill. App. 257, 260), and the decision in *Rittenberg* v. *Monahan*, 381 Ill. 267, on the point that shareholders in a Trust are *not* the stockholders of the corporation which the trust owns, *cannot* be reconciled with the decision in the instant case.

The new theory advanced in the Opinion that shareholders of a valid Trust are liable to creditors who did not know that by the terms of the Trust the shareholders were exempt from individual liability can find no support in any case. The principle exempting shareholders of a Trust from liability *is not based* on the exemption clause contained in the Trust Agreement but on the *pivotal point* whether the Trust is *valid*, or *invalid*. If valid the shareholders are exempt from liability. If invalid, they are considered "partners" and are liable. This was more strikingly pointed out in the decision in *Roberts* v. *Syndicate*, 198 N. C. 381, 384, which commented on the effect of the decision in *Schuman-Heink* v. *Folsom*, 328 Ill. 325.

The Seventh Circuit evidently recognized the *weakness* of its decision when it sought to affirm the *summary* judgement on the ground that if shareholders of a valid Trust are not the shareholders of the securities of the Trust, then the petitioner as a Trustee was liable because he did not exempt himself from personal liability. It recognized in its opinion that the judgment that the petitioner was liable for the *pro rata* amount of his investment in the Trust *cannot be reconciled* with a theory that he was liable as Trustee because the liability would have been for the full amount. Having asked for a summary judgment on the theory that petitioner was liable as the *pro rata* owner

of the 930 shares and having secured the judgment on such a theory, it could not obtain an affirmance on a liability which was "determined upon different principles and measured by a different standard" (*Wrigley & Co.* v. *Larson & Co.*, 5 F. (2d) 731, 742). It failed to take notice of its own decision in *Roschek* v. *Williamson*, 142 F. (2d) 542, that one cannot obtain a judgment on one theory and seek to sustain it on the opposite theory. It failed to follow the Illinois law which is *directly* in point (*Commercial Casualty Ins. Co.* v. *Pearce*, 320 Ill. App. 221) where, after deciding that the Trust was valid and that the defendant was *not* liable as a *partner*, the appellant claimed, as here, "that the failure to include words of limitation of liability" made "the Trustees personally liable" and in holding *against* the contention, the Appellate Court said (p. 328):

> "Here, the Complaint alleges the defendants were *partners* and the case was tried on that theory. It is now too late to claim that they *were Trustees* and liable individually for failure to include words of limitation of liability in the application for the bond."

Seldom can a case be found to be on all fours as is this case. Had the respondent alleged such a cause and tried the case on such an issue, petitioner would have been in a position to meet the issue. However, *no such allegation was made* and the *summary* judgment was *not* based on such a theory. Respondent's case was founded on the theory that petitioner owned 930 shares as a "*partner*" (R. 37(h)). The Opinion squarely held that the petitioner was *not* a partner as this was a "valid Trust" (R. 164). Respondent also inconsistently alleged that petitioner was *not* a partner but a member of a Managing Committee under a Syndicate Agreement and as such *he was a beneficial* owner of the "*assets*" *of the Trust.* It was not alleged that as Trustee or a member of the Manager Committee he was liable on a contract which he made and did

not exempt himself from. It is evident that *under no stretch of the imagination* could such a pleading be considered as an allegation that the defendant as Trustee was liable because he did not exempt himself from personal laibility. No such theory was advanced and the trial court did not enter summary judgment on such a theory.

If petitioner had had his day in Court on a trial on proper allegations, he would have been able to show by *parol* evidence that he never contracted with the respondent and that the respondent *knew* of the exemption contained in the Syndicate Agreement. He would have also been in a position to point out to the Court that the entire proposition that the petitioner did not exempt himself from any liability in making a contract is *fallacious* because there was *never any contract* between the petitioner and the respondent. At best, *there was a contract between Martin* who subscribed for the shares, *and the respondent.* Stock is considered *negotiable* paper under the Uniform Transfer Act (*Priess* v. *Acme Massive Terrazzo*, 309 Ill. App. 475, 479). Only the *person whose signature* appears on a negotiable instrument *is liable*, even though he signs the instrument for the *benefit* of another person. This was squarely held in *Shiel* v. *Chicago Title & Trust Co.*, 262 Ill. App. 410, which is also cited in an abstract decision in a case where counsel for this petitioner represented the plaintiff, *Braverman* v. *Terril Bond & Mortgage Co.*, 272 Ill. App. 603, and certiorari was denied here (292 U. S. 600). There, the trial court held that where a person entered into a contract and fraudulently concealed that he was a "dummy" the third person was liable as the beneficial owner, and a decree was entered against such beneficial owner. The Court of Appeals *reversed* it on the ground that *only the person whose name is subscribed to a negotiable instrument is liable* and he is the

only contracting party. The Court pointed out that it is the frequent practice among business men who do not want to involve themselves in personal liability to employ a nominee to enter into a contract and that under the Negotiable Instrument Law, such a person cannot be held liable.

A fortiorari here where nothing was concealed from the respondent who was not even a creditor at the time. Martin being the nominee for the Syndicate, and later *might be considered the beneficial owner.* Under no theory could the petitioner be held to be the "beneficial owner," and the failure to exempt himself from liability on a contract cannot be applied *to a contract to which he was not a party.* At any rate, the cause of action because of failure to exempt himself from personal liability by virtue of the contract, was *not a*lleged and *never asserted.* It came as a surprise when this theory was advanced by the Court of Appeals. Because of the *character* of the judgment, and the nature and decision on review, petitioner did not have his day in Court.

In view of the fact that the decision in the instant case is *not in harmony* with the decisions of this Court, is in *conflict* with the decisions of the Fourth and Sixth Circuits, and in view of the fact that it *failed to follow the local law,* Petitioner believes that this Court erred in not granting the Writ of Certiorari, and that a rehearing should be granted and the Writ should be issued.

Respectfully submitted,

MEYER ABRAMS,
Counsel for Max Goldberg, Petitioner.

Certificate of Counsel.

The undersigned, Meyer Abrams, counsel for Petitioner, Max Goldberg, hereby certifies that he has prepared the foregoing Petition for Rehearing and is of the opinion that it is well founded in point of law, and is not interposed for purposes of delay.

Meyer Abrams.